IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS' ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR THE APPELLEES, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON.

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Attorney for Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton, Appellees.

THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO 80

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OPINION BELOW.

The opinion of the court below (R. 17), the District Court for the Northern District of Illinois (Perry, *J.*) is unreported.

JURISDICTION.

The District Court on January 20, 1953, entered an order granting the appellees' motion to strike the appellant's complaint and dismiss the action (R. 20-21). Thereupon, on September 18, 1953, the appellant, invoking Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Section 29, as amended by Section 17 of the Act of July 25, 1948, 62 Stat. 869, procured an order of the District Court allowing an appeal to this Court (R. 21-22). This Court denied the appellees' motion to dismiss the appeal or affirm the conviction below and noted probable jurisdiction of the cause on November 30, 1953 (R. 24).

QUESTIONS PRESENTED.

The questions presented are:

1. The complaint did not state facts sufficient to constitute a cause of action against the defendants Local 6 and Byron Dalton.
2. The conduct involved is immunized from being a violation of the Sherman Act by the Clayton and Norris-LaGuardia Act.
3. The Complaint does not set forth sufficient allegations of fact to sustain a charge of conspiracy.
4. The Complaint on its face demonstrates that there has been no restraint of interstate commerce within the meaning of the Sherman Act.

The Government filed a Complaint in Chancery against Employing Plasterers Association of Chicago, an Illinois corporation, organized under the Illinois not-for-profit corporation laws, hereinafter referred to as the "Association," and Journeymen Plasterers Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., an unincorporated Labor Union, with its place of business and offices in Chicago, consisting of 1200 Journeymen Plasterers and

Apprentices, hereinafter referred to as "Local," and Byron William Dalton, described as President of said Local, charging that they engaged in an unlawful combination and conspiracy to suppress competition among the Plasterer Contractors in the Chicago area and to exclude persons from engaging in the plastering contracting business in said area, in unreasonable restraint in trade and commerce among the several States and to monopolize the interstate commerce in the sale, distribution, and installation of plastering materials utilized in the Chicago area in violation of Sec. 1 of the Sherman Act (R. 1, *et seq.*).

The complaint prays for an injunction.

The complaint avers there are 140 plastering contractors in the Chicago area, doing a dollar volume business of $25,000,000. 39 of the 140 are members of the Association and they do a volume of business of $15,000,000.

The complaint avers that the plastering materials are mostly produced in other States and are purchased in interstate commerce by material dealers who, in turn, sell the material to the plastering contractors; that large quantities of the plastering materials are warehoused and sold by the dealers to the contractors and substantial quantities are caused to be delivered by the contractors directly to the job site.

The complaint avers that the Local has an Examining Board, who examined each plastering contractor except those who were in business at the inception of the conspiracy and refuses to allow its members to work for any contractor who is not approved by the Local; that none of the members of the Association perform plastering work for a general contractor who has an unresolved dispute with another plastering contractor; that out-of-State plastering contractors are excluded from engaging in the plas

tering contracting business in the Chicago area and that these agreements are enforced by strikes and slow-downs.

There is no averment that the purpose of the agreement is to restrain interstate commerce; there is no averment that as a result of the agreement there is any diminution or restriction of interstate commerce; and there is no averment that it has any effect upon the number of buildings constructed in the Chicago area or the amount of the material used therein. The only averment with reference to its effect upon interstate commerce is by way of conclusion of the pleader.

The motion to dismiss the complaint was filed by each of the defendants, because the complaint fails to state a claim against these defendants upon which any relief can be rendered (R. 10).

Upon a hearing, the Court sustained the motion to dismiss. The Government elected not to amend, and the suit was dismissed. The reason for the action of the Court (R. 13), was that the defendants were not engaged in interstate commerce and the contractors became possessed of the materials after it came to rest in Illinois and it ceased to be a component part of interstate commerce; that the defendant Local and Dalton were not engaged in interstate commerce; that the agreement was an intrastate agreement and there was no averment that it had any effect upon the market price of the material. There was no averment of any discrimination against anyone engaged in interstate commerce; there was no allegation of fact of its effect upon the flow of materials into the State of Illinois.

STATUTE INVOLVED.

The germane portions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

29 U. S. C. A. (Norris-La Guardia Act):

> Sec. 101. Issuance of restraining orders and injunction; limitation; public policy.
>
> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections.
>
> Sec. 102. Public policy in labor matters declared.
>
> In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Sec. 103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts.

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the follwing:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore

specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Sec. 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies.

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Sec. 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be

issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Sec. 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions.

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific

act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 113. Definitions of terms and words used in chapter.

When used in this Act, and for the purposes of such sections—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regard-

less of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 115. Repeal of conflicting acts.

All acts and parts of acts in conflict with the provisions of this Act are hereby repealed.

STATEMENT.

With one exception, the Government's "statement" is substantially accurate.

At page 4 the Government states that "the complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the state of Illinois for installation in buildings in the Chicago area." This we deny. There is in terms no such allegation in the entire complaint. The very issue before the Court is whether the sum total of the allegations of the Complaint constitute such a charge.[1]

The Government does state, and it is alleged (Par. 17, R. 5), that any restraint upon the performance of plastering work in Chicago necessarily and directly restrains and affects the interstate flow of plastering materials, but again we say that this is a pure conclusion.

---

1. It is alleged that one of the effects of the conspiracy has been that the flow in interstate trade and commerce of plastering materials "has been unlawfully restrained." (Par. 29, R. 8.) But this, we say, is a pure conclusion that cannot aid the complaint if it is otherwise defective.

ARGUMENT.

There Is No Relationship Between U. S. v. Employing Lathers Association, No. 439 on this Docket, and this Case No. 440.

At the outset it should be made clear that there is no relationship between the case of *United States of America* v. *Employing Lathers Association,* No. 439, on this docket, and this case No. 440.

The two cases involve entirely different factual situations. The District Court had both cases pending before it at the same time and made its decision of the two cases jointly. The Government in its brief apparently for the sake of brevity adopts certain pages of its brief in No. 439 as applying from a citation point of view to this case. This situation has added to the difficulty of these defendants in adequately replying. The only actual similarity between the two cases is that in each case the charge is a conspiracy to violate the Sherman Act and in each case the defendants consist of a local union and an association of employers, but they are different local unions and different associations of employers. We regret the Government has thus confused the issues.

The Complaint Is Faulty in that It Fails to Aver the Particulars of the Offense Charged.

Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense unless the words themselves fully, directly and expressly, without uncertainty or ambiguity, set forth all of the essential elements in order to constitute the crime.

U. S. v. *Britton,* 107 U. S. 655, 27 L. Ed. 520.
U. S. v. *Carl,* 105 U. S. 611, 26 L. Ed. 1135.

Where the statute is general in terms and fails fully directly and expressly to set forth with certainty and without ambiguity all of the elements necessary to constitute the offense, the pleading must descend to particulars and charge every constituent ingredient of which the crime was composed.

U. S. v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.
U. S. v. *Hess*, 124 U. S. 483, 31 L. Ed. 562.

The Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

Appalachian Coals, Inc. v. *U. S.*, 288 U. S. 344, 77 L. Ed. 825.

The complaint in this case fails to measure up to these requirements. Paragraph 19 of the complaint entitled "Combinations and Conspiracy" merely avers that beginning in or about 1938 and continuing to date, the defendants and their co-conspirators and others unknown, have engaged in an unlawful combination and conspiracy to suppress competition among plastering contractors in the Chicago area and to restrict and exclude persons from engaging in the contracting business in such area in unreasonable restraint of trade and commerce among several states and to monopolize the interstate commerce as hereinbefore described in the sale and distribution of plastering materials utilized in the Chicago area in the performance of plastering contract work in violation of Sections 1 and 2 of the Sherman Act. This charge, if it amounts to a charge of violation of the Sherman Act, which is doubtful because it charges things not condemned by the Sherman Act, is so indefinite as to require the pleader to descend to particulars and allege the ingredients of which the offense is composed. There is no charge of any at-

tempt to restrict shipments, to restrict buildings, or to restrict and curtail the use of plastering materials.

The particularization required by law is attempted in paragraph 20 and in subsequent paragraphs in the complaint. It is there alleged Local 5 has maintained in force rules requiring anyone who desires to be a plastering contractor to take an examination by a board of examiners composed exclusively of the Board members of the Local Union. It is averred that this rule is enforced by a refusal of the members of the Local to work for any contractor who has not passed the examination. No agreement between the Association and the Union with respect to this is averred. There is no averment as to any details of the examination; there is no averment that any specific person was ever denied Union labor because he failed to pass the examination; there is no averment that there was any discrimination in the application of the rule. It may well be inferred that the examination is for the purpose of ascertaining the financial stability of the contractor and of assuring the payment of the wages earned by the members of the Union; that the agreement is for the purpose of determining whether or not the contractor has the skill and knowledge to enable him properly to mix the various ingredients that go into the plastering job. No inference of impropriety or wrongdoing can be drawn from the averment. There is no impropriety in the wage earner selecting his employer with the same discrimination that the employer selects his employee.

It is averred that no plastering contractor in the Chicago area is permitted to alter the membership or management of his firm or organize the corporation without first securing the approval of the Local. How this can in any way affect interstate commerce is not evident. Altering the financial structure of the contractor's business might

have serious repercussions upon his financial stability. The purpose of such a rule apparently is to assure the employee of a financially sound employer. The advantage of such precaution is graphically shown by a list of industrial and commercial failures in the appendix hereto.

It is averred that for many years last past "the defendant Association and Local 5 have incorporated into a joint agreement a so-called "original contractor" rule. Under the rule, plastering contractors in the Chicago area, including the members of the Association, are required to boycott and refuse to enter into plastering contracts with any general contractor on any plastering job on which another plastering contractor has started work or has received a contract, except with the consent of the original contractor. This cannot have the remotest effect upon interstate commerce. It is important, however, to observe the language of the averment to the effect that for many years the Association and the Local have incorporated into a joint agreement. This joint agreement apparently means a wage agreement, a contract concerning the terms and conditions of employment. It alleges that when a general contractor tried to escape the original contractor rule by contracting with out-of-state union contractors to do work in the Chicago area, the defendants have harassed and intimidated such out-of-state contractors in order to assure adherence to the rule.

To reach the point of any effect of the alleged conspiracy, the complaint does not even charge that any out-of-state plastering contractor ever came in to Chicago area to bid a plastering contract, and further that if they did accept such a contract that the union did any thing or require them to enter into a collective bargaining agreement on any or different terms than Chicago plastering contractors.

The complaint affirmatively shows these things did *not* take place, for it charges "* * * Defendants have been so successful in excluding out-of-state plastering contractors from the Chicago area by use of tactics such as those described above that no out-of-state plastering contractors have undertaken to perform plastering contracts in the Chicago area for nearly *twenty years,* except for one veterans hospital, one Federal housing project, and one state hospital" (Pa. 28, R. 7, 8). (Emphasis supplied.)

The alleged conspiracy is charged as having begun "in or about 1938" (Par. 19, R. 5).

Thus, on the face of the pleading which was filed in 1952, it appears that for *six* years prior to the alleged conspiracy no out-of-state contractor came into Chicago or if they did they were subject to the same conditions insofar as the union acting alone was concerned as they were after 1938, for it is charged that because of the "tactics" used no out-of-state plastering contractors have "*undertaken*" to perform plastering contracts. Therefore, if for 20 years prior to the filing of the complaint herein no out-of-state contractor undertook to perform any contract in the Chicago area which was 6 years before the alleged conspiracy and the same reasons compelled them to stay out of the Chicago area when the Union was acting alone, in what manner could alleged conspiracy have kept them out if the Union acting alone did only that which it did before 1938? Further, after 1938, three huge projects were performed by out-of-state contracts and there is no charge that any of the "tactics" were used against them as a result of the alleged conspiracy.

The pleading on its face negatives any inference of wrong doing or illegality insofar as the Sherman Act is concerned.

In the case of the *U. S. Bay Painters & Decorators Joint*

Committee, Inc., et al., 49 Fed. S. 734, the Court dealt with the factual situation remarkably parallel to the situation presented by the complaint in this case. There the indictment alleged that the conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

> "(a) Defendant employers and defendant Unions have agreed to restrict the use of painting by spray equipment, by oral and written agreements which have been renewed from year to year, within the period of this indictment pursuant to and in furtherance of this conspiracy. The rest of the charges relate to enforcement of the agreement by refusal to furnish labor, the levying of fines, etc."
>
> "The indictment further alleged that the things done and the acts performed in furtherance of the conspiracy had the necessary direct effect of substantially affecting, restraining and diminishing interstate commerce in spray equipment, paints and painting materials."

The indictment contained one averment not found in the instant case.

> "The things done and the act performed incident to and in furtherance of the conspiracy were intended by the defendants to affect and restrain and diminish interstate commerce in spray equipment, paints and painting materials."

The Court said (p. 735):

> "It is obvious that these allegations are mere legal conclusions. There is no allegation of any actual or direct prevention of the manufacture or sale of the spray equipment or of its shipment into the State. There is no allegation that the defendants intended to fix prices or suppress competition."
>
> "It was said in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, that 'restraints on competition or on the course of trade in the mer-

> chandising of articles moving in interstate commerce' do not violate the Sherman law 'unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantage which they derive from free competition. The restraint here has not been shown to have any actual or intended effect upon price or price competition. In *Appalachian Coal* v. *U. S.*, 288, U. S. 344, 53 S. Ct. 471, 77 L. Ed. 825. The Court quotes with approval the following language: 'Only such contracts are within the act as by reason of intent or the inherent nature of the contemplated acts, prejudice to public interests by unduly restricting competition or unduly obstruct the course of trade'."

The Court held the indictment bad.

In the case at bar, there is no averment of any intended effect upon interstate commerce; there is no averment that the flow of commerce in plastering materials was restricted in the slightest; there is no averment of any restriction in the construction of buildings; there is no averment of any increase in cost of the materials; the pleader relies entirely upon his conclusion that commerce was restrained.

If there was any effect upon interstate commerce in plastering materials, it was incidental and remote. It spent its efforts upon the local situation. "Activities local in their immediacy do not become interstate and national because of distant repercussions." *A. L. A. Schecter Poultry Corporation* v. *U. S.*, 295 U. S. 495, 534, 70 L. Ed. 1570.

In the instant case, the alleged unlawful acts of the defendants spent their intended and directed efforts on a local situation that building is as essentially local as mining, manufacturing, or growing crops, and if by resulting diminution of the commercial demand, interstate trade was curtailed generally or in specific instances, that was a fortuitous consequence so remote and indirect. *Industrial As-*

sociation v. *U. S.*, 263 U. S. 64, 82; 69 L. Ed. 849, 855. The alleged acts fall outside the orbit of the Sherman Act.

The Defendant Local 5 and Dalton Were Not Engaged in Interstate Commerce.

The Complaint avers the plastering materials were purchased from out-of-state sources by material dealers. The material dealers were located in the Chicago area. They, in turn, by a local transaction, sold the plastering materials to plastering contractors. The plastering contractors engaged to apply the materials to the walls and ceilings of buildings being constructed in the form of plaster. This involved a sale to the general contractor of the plastering materials and the labor it took to apply them. The members of defendant Local never became possessed of the plastering materials. They only contributed their labor in applying the materials in a mixed condition to the walls and ceilings of buildings being constructed. They were merely employed as laborers on a local project by a local contractor to apply a mixture of local products with plastering materials which had in the past been an item of interstate commerce but which had come to rest within the state of Illinois, and had been the subject of two (2) local sales. After the application of their labor the products became real property and nothing can be more local than real property. They had absolutely no connection with the interstate aspects of the material. It is doubtful if they even knew the origin of the materials. Any transaction, therefore, between them and the defendant Association dealt only with the application of their labor to products purchased by the plastering contractor from a local dealer. It is not averred that either the members of Local 5, the defendant Dalton or the Association had any purpose in mind to restrict or restrain interstate commerce

or the use of plastering materials or in any way to curtail the number of buildings being constructed. Indeed, it would appear that their interest lay in exactly the opposite direction. The members of the Association were in the business of contracting for the installation of plastering. The members of the union were in the business of selling their labor in the installation of plastering. Any restriction in the shipment or use of plastering materials would work to their disadvantage. Therefore, the common sense of the situation negatives the implication the government would draw from the facts averred.

Therefore, we are dealing with a contract between local people engaged in local trade. Any effect their agreements may have had upon interstate commerce was of necessity indirect, incidental and inconsequential. Under the authorities heretofore cited, this does not bring their relationship within the condemnation of the Sherman Act, and the courts of the United States are without jurisdiction.

No Case Is Stated Against the Defendant Dalton.

There is a complete absence of any averments affecting the defendant Dalton. He is described in the introduction portion of the complaint (R. 2) as being the President of Local 5 and was business agent of such local for many years prior to becoming president. No mention is made of his connection with the alleged conspiracy. Indeed, his name is mentioned only twice (R. 6) and that is by way of conclusion.

The charge of conspiracy must be specific enough (a) that the defendants may be apprised of the charge they have to meet and be able to prepare their defense; (b) so that the defendants can plead former jeopardy; and (c) so that the court can tell whether the facts

alleged if proved will constitute an offense. *U. S.* v. *Cruikshank,* 92 U. S. 542, 23 Lawyers Edition, 588.

It is apparent that the charge is insufficient. As was said in *U. S.* v. *French Bauer,* 48 F. Supp. 261:

> "When the Government invokes jurisdiction of the court to determine whether a particular conspiracy or particular acts alleged to constitute a conspiracy are reached by the Sherman Act I think it clear that facts must be alleged, which, if established by proof, would bring the acts complained of within the scope or reach of the Sherman Act."

It has been demonstrated that the complaint fails to state a cause of action. In the case of *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 102, 77 Lawyers Edition, 1062, this court used the following language:

> "Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial."

Under the Facts Alleged These Defendants Are Immunized Under the Clayton Act and the Norris-La Guardia Act.

The complaint avers Local 5 to be a labor union; the defendant Dalton to be President of the labor union; the members of the Association to be employers of members of the union. The complaint likewise refers (R. 7, Par. 25) to a joint agreement between Local 5 and the Association. A joint agreement used with reference to employer-em-

ployee relationship has a well understood meaning. It means an agreement respecting the terms and conditions of employment.

No decision prior to *Apex Hosiery* v. *Leader,* 310 U. S. 469 (1940) and *United States* v. *Hutcheson,* 312 U. S. 235, has any application because in both of these cases the Supreme Court of the United States has determined that Congress intended and did exempt from the operation of the Sherman Anti-Trust Act labor unions pursuant to the provisions of Section 20 of the Clayton Act and the later Norris-La Guardia Act. As was stated in *U. S.* v. *Hutcheson,* 312 U. S. 235, and 236:

> "There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act insofar as 'any law of the United States' is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress * * *. It was precisely in order to minimize the difficulties which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure."
> P. 229: "On the other hand the statute may validly satisfy the statute under which the pleader proceeded, but on the other, statutes not referred to by him may draw the sting of criminality from the allegations."
> P. 232: "Were then the acts charged against the defendant prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment came within the conduct enumerated in Section 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States.' "

As stated by the Supreme Court of the United States, any act which is lawful under any law of the United States cannot be considered a violation of the Sherman Law.

As stated in the *Hutcheson* case (page 234), Mr. Justice Frankfurter said:

> "It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment or heavy fines. This is not the way to read the will of Congress particularly when expressed by a statute which as we have already indicated is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness."

On page 236 the court specifically said:

> "The Norris-LaGuardia Act asserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all allowable conduct from the taint of being a 'violation' of any law of the United States, including the Sherman Law."

Again, in the *Hutcheson* case, as said on page 231:

> "* * * whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."

To the same effect is *Apex Hosiery* v. *Leader*, 310 U. S. 469. Thus, it is necessary for the complaint to aver that the activities complained of were not legal under the terms of the Clayton Act and the Norris-LaGuardia Act. It was

held by the District Court in the case of *U. S.* v. *Carrozzo,* 37 Fed. Supp. 191, at 195:

> "It must clearly appear from the indictment that the activities with which defendants are charged are such as unreasonably restrain interstate commerce and prejudice the public interests, and are not activities which come within the normal, legitimate and lawful activities which may be employed by a labor union, and which, under Sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act, are exempt from prosecution under the Sherman Act."

To the same effect is *U. S.* v. *American Federation of Musicians,* 47 Fed. Supp. 304, affirmed by memorandum, 318 U. S. 741, 87 L. Ed. 1120, and the *U. S.* v. *Bay Area Painters and Decorators Joint Com.,* 49 Fed. Supp. 733.

Complaint Must Specifically and Unequivocally Charge a Violation of the Sherman Act Where Labor Unions Are Involved.

Section 101, of the Norris-LaGuardia Act, specifically prohibits courts of the United States from issuing any restraining order in a case involving or growing out of a labor dispute *"except in a strict conformity with the provisions of such sections."*

Section 105 of the Norris-LaGuardia Act provides in effect that no injunction shall issue upon the "ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Immunized acts which are enumerated in Section 104 are "(a) Ceasing or refusing to perform any work or to remain in any relation of employment;" or "(g) Advising or notifying any person of an intention to do any of the

acts heretofore specified; (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, * * *".

Section 106 provides that no officer or member of any association or organization participating or interested in a labor dispute shall be held liable in any court of the United States for the unlawful acts of individual officers, members or agents, "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 113 of the Norris-LaGuardia Act declares that a case shall be held to involve or grow out of a labor dispute when it involves persons who are in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees. It makes no difference under this definition as to whether it is an employer association or an association of employees, because the definition states that it makes no difference whether the dispute is between one or more employers or association of employers and one or more employees or association of employees, when the case involves any conflicting or competing interest in a labor dispute of persons participating or interested therein.

As stated in *United Brotherhood* v. *United States,* 330 U. S. 395, 401, 91 L. Ed. 973, 981, where the indictment alleged that the purpose and effect of the conspiracy was to restrain out of state manufacturers from shipping and selling commodities within the San Francisco Bay Area in California. The court there said "it properly is conceded that this agreement grew out of such a labor dispute

and that all parties defendant participated or were interested in that dispute."

Therefore, the alleged conduct stated in the complaint being a labor dispute and that no injunction can be issued unless "in strict conformity with the provisions" of the Norris-LaGuardia Act (Section 101) and that the responsibility of officers and members of associations for any alleged unlawful act of individual officers cannot be had except upon clear proof of actual participation therein or ratification after actual knowledge (Section 106). It, therefore, becomes incumbent upon the government to not only specifically plead and aver facts which will show that this is not a labor dispute, and, therefore, exempt from the operation of the Sherman Act, but also must allege and aver that the union and the officers had actual knowledge of the alleged illegality or that the union after knowledge ratified acts.

These allegations are missing from the complaint and, therefore, do not state a cause of action against Local 5 and Byron Dalton.

Section 104 specifically immunizes the right to cease or refuse to perform any work or to remain in any relations of employment or advising or notifying any person of intention to do any of the acts specified or agreeing to do or not to do any of the acts specified in Section 104. Therefore, the allegation that the union has not furnished men for out of state contractors is legal and immunized conduct under the Norris-LaGuardia Act.

A complaint seeking an injunction in a labor dispute must, as a pre-requisite, comply with all the requirements of the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen* v. *Toledo, etc.*, 321 U. S. 50 64 S. C. T. 413.

Section 8 of the LaGuardia Act (29 U. S. C. A. Section 108) denies injunctive relief "to any complainant" who has failed to comply with any obligation imposed by law.

As has been pointed out by the Court in *United Brotherhood* v. *U. S. supra,* even in a criminal case brought by the United States that the Norris-LaGuardia Act applies to a labor dispute.

If they choose the injunctive remedy in a labor dispute, they must be in complete compliance with the provisions of the Norris-LaGuardia Act.

This emphasizes the requirement of the government in this case, when seeking an injunction in a labor dispute involving or growing out of a labor dispute. Its duty to specify and particularize the averments in the complaint, not in general language or legal conclusion as contained in this bill of complaint, but in a detailed and specific manner.

This Court in *Brotherhood Railroad Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. at page 63—88 Lawyers Ed. on page 542 said:

> "Nor does it follow, as respondent seems to imply, that it is left without remedy. Other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist. Federal statutes supply criminal sanctions, enforceable in the federal courts, against persons who interfere in specified ways with the operation of interstate trains or destroy the property of interstate railroads. Cf. 18 U. S. C. A.—412a, 7 F. C. A. title 18,—412a. With these and other remedies that may be available we are concerned no further than to point out that respondent's failure to observe the requirements of sec. 8 has not left it without legal protection. That failure has deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold. With the wisdom of that action we have no concern. It is enough, for its enforcement, that it is written plain and does not transcend the limits of the legislative power. Cf. *Lauf* v. *E. G. Shinner & Co.* 303 U. S. 323, 82 L. Ed. 872, 58 S. Ct. 578."

Conclusion.

The lower court should be sustained for the reason that the complaint is completely insufficient in its averments. It depends upon conclusion and omits averments of fact.

There are no averments that the alleged actions of the defendants in any way directly affect interstate commerce, have any bearing upon the normal flow thereof or upon the price of the plastering materials therein.

That no monopoly is averred or proved and the facts averred negative the possibility of the existence of a monopoly.

That it appears from the averments in the complaint that the agreements between the Association and Local 5 were made with respect to terms and conditions of employment and were not intended to and did not as a matter of fact affect interstate commerce.

That under the facts averred the provisions of the Clayton Act and the Norris-LaGuardia Act remove the Local from the condemnation of the Sherman Act.

Respectfully submitted,

DANIEL D. CARMELL,
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APPENDIX.

Industrial and Commercial Failures, 1952

Construction	Failures	Liabilities
January, 1952	68	$2,672,000
February	70	1,935,000
March	72	2,485,000
April	93	3,853,000
May	75	2,646,000
June	78	2,990,000
July	48	3,196,000
August	58	1,816,000
September	50	2,729,000
October	88	5,167,000
November	62	1,588,000
December	76	5,068,000
Monthly Average (1952)	70	3,012,000

Source: Business Statistics, 1953 Biennial edition. Gov't Printing Office, 1953, page 24. (Compiled by U. S. Dep't of Commerce, office of Business Economics).
"A failure is defined as a concern that is involved in a court proceeding or a voluntary action that is likely to end in loss to creditors."
(Credit is given by Gov't to Dun & Bradstreet for above figures.)

Industrial and Commercial Failures, 1953.

Construction Industry	Failures	Liabilities
January, 1953	78	$2,735,000
February	86	3,378,000
March	85	3,506,000
April	86	3,748,000
May	70	2,511,000
June	99	3,200,000
July	64	2,789,000
August	92	3,868,000
September	89	4,451,000
October	89	4,366,000

Source: Survey of Current Business, Dec. 1953, page 5-4. U. S. Dep't of Commerce, Office of Business Economics. (Figures are credited to Dun & Bradstreet.)